Hongkong Bank (M) Bhd v William Tan Enterprise Sdn Bhd

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–264 OF 1998–III/II
MUHAMMAD KAMIL J
14 MAY 1999

Civil Procedure *— Service — Statutory notice of demand — Failure to serve as required by s 148(2)(c) of Sarawak Land Code (Cap 81) — Effect of*

Civil Procedure *— Service — Notice under O 83 r 3 of Rules of the High Court 1980 — Failure to file — Whether mere irregularity and can be cured — Rules of the High Court 1980 O 2 r 2 & O 83 r 3*

In September 1998, the plaintiff made an application for the sale of the defendant's land under s 148(2)(c) of the Sarawak Land Code. The said land had been charged to the plaintiff as security for a loan granted by the plaintiff to the defendant. The application is supported by two affidavits affirmed respectively in September 1998 and February 1999.

At the onset of the hearing, the defendant raised two preliminary objections:

(a) the plaintiff had failed to serve the statutory notice of demand as required by s 148(2)(c); the plaintiff claims that such notice ('LPK4') had been served in February 1997; and

(b) the plaintiff had failed to file a notice that complies with the provisions of O 83 r 3 of the Rules of the High Court 1980 ('RHC'); the plaintiff contends that this is a mere irregularity and can be cured by O 2 r 2.

Held, dismissing the application:

No statutory notice as required by s 148(2)(c) of the Sarawak Land Code has been served by the plaintiff in respect of this application. It is obviously unmistakable that the notice LPK4 cannot relate to the present application. The total sum claimed in LPK4 was RM5,308,664.34 whereas in this application RM6,400,423.19 is claimed (see p ***2I–3A).

The plaintiff has failed to file a notice that complies with the requirements of O 83 r 3 of the RHC. The originating summons and both the affidavits in support did not state the amount of repayments, the amount remaining due under the charge and the amount of a day's interest. Non-compliance with O 83 r 3 is not a mere irregularity which can be cured under O 2 r 2. In an action for sale of charged land to recover the loan and interest, it is mandatory on the part of the plaintiff to comply with O 83 r 3 and failure to do so would warrant the dismissal of the originating summons by the court (see pp 297I-298A, G–H)

[Bahasa Malaysia summary

Pada September 1998, plaintif membuat permohonan untuk jualan tanah defendan di bawah s 148(2)(c) Kanun Tanah Sarawak. Tanah tersebut telah digadaikan kepada plaintif sebagai jaminan untuk pinjaman yang diberikan oleh plaintif kepada defendan. Permohonan tersebut adalah disokong oleh dua afidavit yang telah diikrarkan masing-masing pada September 1998 dan Februari 1999.

Pada permulaan pembicaraan defendan menimbulkan dua bantahan-bantahan awal:

(a) plaintif telah gagal menyampaikan notis tuntutan statutori seperti yang diperlukan oleh s 148(2)(c); plaintif mendakwa notis sedemikian (LPK4) telah disampaikan pada Februari 1997; dan

(b) plaintif telah gagal memfailkan suatu notis yang mematuhi peruntukan-peruntukan A 83 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); plaintif menegaskan bahawa ini hanyalah suatu salah aturan sahaja dan boleh diatasi dengan A 2 k 2.

Diputuskan, menolak permohonan tersebut:

Tiada notis statutori seperti yang diperlukan oleh s 148(2)(c) Kanun Tanah Sarawak telah disampaikan oleh plaintif berkenaan dengan permohonan ini. Adalah terangnya memang jelas bahawa notis LPK4 tidak boleh berkaitan dengan permohonan kini. Jumlah keseluruhan yang dituntut di dalam LPK4 adalah RM5,308,664.34 manakala di dalam permohonan ini RM6,400,423.19 adalah dituntut (lihat ms 296H).

Plaintif telah gagal memfailkan suatu notis yang mematuhi keperluan-keperluan A 83 k 3 KMT. Saman pemula dan kedua-dua afidavit sokongan tidak menyatakan jumlah pembayaran balik, jumlah yang harus dibayar di bawah gadaian tersebut dan jumlah faedah seharian. Kegagalan pematuhan dengan A 83 k 3 bukan semata-mata salah aturan sahaja yang boleh diatasi dengan A 2 k 2. Di dalam suatu tindakan untuk jualan tanah yang digadaikan untuk mendapat kembali pinjaman dan faedah tersebut, adalah mandatori pada pihak plaintif untuk mematuhi A 83 k 3 dan kegagalan berbuat demikian akan mewajarkan penolakan saman pemula tersebut oleh mahkamah (lihat ms 297I–298A, G–H).]

Notes

For cases on service generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4069–4160.

Cases referred to

Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor [1995] 2 MLJ 537 (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)
Maimunah bte Megat Montak v Mayban Finance Bhd [1996] 2 MLJ 422 (refd)
Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors [1995] 4 MLJ 741 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Public Bank Bhd v Berjaya Housing Development Sdn Bhd & Ors [1995] 1 CLJ 237 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 r 2(1), O 14 r 2, O 62 r 5(2), O 83 r 3(3)(b), (d), (6), (7)
Sarawak Land Code (Cap 81) s 148(2)(c)

Stanley Eddy (*Battenberg & Talma*) for the plaintiff.
Ernest Chua (*Ernest Chua & Co*) for the defendant.

Cur Adv Vult

Muhammad Kamil J: This is the plaintiff's originating summons filed on 22 September 1998 (encl 2) for an order for sale under s 148(2)(c) of the Sarawak Land Code (Cap 81) of defendant's charged land known as Lots 58 and 199 Kuching Town Land District, as security for a loan of RM5m granted by the plaintiff to the defendant. The application is supported by the affidavit of Lim Peng Kiat affirmed on 19 September 1998 and 9 February 1999. It is opposed by the affidavit in reply of Kho Poh Na affirmed on 11 January 1999.

At the onset of the hearing the defendant raised two preliminary objections:

(a) the plaintiff had failed to serve the statutory notice of demand as required by s 148(2)(c) of the Sarawak Land Code before the institution of the originating summons; and

(b) the plaintiff had failed to comply with the provisions of O 83 r 3 of the Rules of the High Court 1980 ('RHC'), particularly r 3(3), (6) and (7) of O 83.

The plaintiff submitted that there had been a statutory notice dated 6 February 1997 ('exh LPK4') which was served on the defendant. The said notice is reproduced below:

SE/DL/HK: 193/B/96

6 February 1997

The Managing Director
William Tan Enterprise Sdn Bhd
c/o Lot 249, 2nd Floor
Jalan Tuanku Abdul Rahman
93100 Kuching

AR Registered

Dear Sir

HBMB v William Tan Enterprise Sdn Bhd
Current A/C No 322-174756-001

We act for and on behalf of Hongkong Bank Malaysia Bhd of Jalan Padungan, 93100 Kuching, Sarawak.

We refer to your Current Account No 322-174756-001 arranged between you and our client whereby the present outstanding as at 22 January 1997 are as follows:

Overdraft	:	RM 5,263,554.12
Interest accrued	:	RM 45,110.22
		RM 5,308,664.34

Interest is accruing at 2.00% above our client Base Lending Rate (currently at 9.15% per annum) on daily rest basis.

We hereby give you notice that our client has recalled the aforesaid advances. Take note that if within thirty (30) days of receipt hereof you fail to pay up the aforesaid advances of RM5,308,664.34 together with our legal fees and disbursements, we shall institute legal proceedings against you to recover all advances granted to you.

Kindly therefore give this matter your immediate attention.

Yours faithfully,

(Signed)

cc: client

(Your ref : KUC/CDT/William Tan/LPK/LHK/tsm)

The defendant averred that the notice LPK4 was served in respect of the previous foreclosure proceedings in Originating Summons No 24-90-97/III/II, which was dismissed by the court on 18 May 1998, on the ground of non-compliance with O 83 r 3 RHC 1980. The purported notice of demand shown in LPK4 was out of date, had outlived its usefulness and is therefore of no legal effect. This was stated in para 11 of Kho Poh Na's affidavit affirmed on 11 January 1999, and it was never challenged by Lim Peng Kiat in his affidavit affirmed on 9 February 1999. The defendant submitted that by the plaintiff's failure to challenge it, the plaintiff was deemed to have admitted the fact that there was no statutory notice served on this action: see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281.

In the case, it seems clear to me that no such notice under s 148(2)(c) has been served in respect of this application. As rightly pointed out by the learned counsel for the defendant, the notice LPK4 dated 6 February 1997 could not be said to have been filed in this case. It is to be noted that the total sum claimed in LPK4 was RM5,308,664.34 whereas in this application RM6,400,423.19 is claimed. As such it is obviously unmistakable that the notice LPK4 cannot relate to the present application. I find that no statutory notice has been served in respect of this originating summons and, therefore, the defendant's objection (a) is sustained.

A In the originating summons and the affidavit in support of Lim Peng Kiat affirmed on 19 September 1998, it is stated thus:

Original Overdraft amount	-	RM 5,000,000.00
Interest in arrears	-	RM 1,388,082.56
Interest accrued	-	RM 12,338.63
B Miscellaneous charges	-	RM 2.00
Total payoff amount as at 30 July 1988		RM 6,400,423.19

The defendant submitted that the plaintiff had failed to state:

(a) the amount of repayments;

C (b) the amount remaining due under the charge; and

(c) the amount of a day's interest as required under r 3(3)(b) and (d) and r 3(7) of O 83 RHC 1980.

The second affidavit of Lim Peng Kiat affirmed on 9 February 1999 also did not state the amount of repayments, the amount remaining due under the D charge and the amount of a day's interest. The failure to give an accurate amount in the affidavits, makes it not possible to work out the exact amount of the plaintiff's alleged claim.

Learned counsel, Mr Stanley Eddy submitted that under O 2 r 2(1) RHC it is provided that an application to set aside for irregularity any E proceedings, any step taken in any proceedings shall not be allowed unless it is made within a reasonable time before the party applying has taken any fresh step after becoming aware of the irregularity; and thereby waives the right to raise this particular preliminary objection: see *Public Bank Bhd v Berjaya Housing Development Sdn Bhd & Ors* [1995] 1 CLJ 237; and *Malayan United Finance Bhd v Sun Chong Construction Sdn Bhd & Ors* F [1995] 4 MLJ 741.

The two authorities cited above can be distinguished easily as they refer to a mere irregularity. In the former case, where a preliminary objection was raised in an O 14 application, that the defendant's affidavit was defective for non-compliance with O 14 r 2 (Form 18) RHC 1980, in not stating the G deponent's personal knowledge in the matter, source of information and the deponent's address. There was no prior notice given of the objection. The court held that by its conduct, the defendant had waived its right to raise the objection

In the later case, the court held that non-compliance with para 5 of the Practice Note and sub-r 5(2) of O 62 was no more than an irregularity H which could not result in the proceedings being nullified, and the respondent was not adversely affected by the omission.

In the instant case, non-compliance of O 83 r 3 is not a mere irregularity. The omission is very serious as it undermines the very basis on which the statutory notice is based.

I In my view, non-compliance of O 83 r 3(3) and (6) is not a mere irregularity which can be cured under O 2 r 2. The provisions under O 83 r 3 are mandatory. Non-compliance renders the notice void and of no

effect. It would render the application for sale of charged land invalid. It is settled law that in an action for sale of charged land to recover the loan and interest, it is not only obligatory but mandatory on the part of the plaintiff to comply with O 83 r 3(3), (6) and (7) RHC and failure to do so would warrant the dismissal of the originating summons by the court. This principle was approved by the Supreme Court in *Maimunah bte Megat Montak v Mayban Finance Bhd* [1996] 2 MLJ 422.

In *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608, Shanker J (as he then was) held (at p 608E–I) that:

> (1) The plaintiff had applied for an order for sale in order to effect repayment of moneys secured by a charge and, on a reading of O 83 rr 1(1)(a), (b), (c), 3(3) and 3(6) [RHC] together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission if no real prejudice would thereby result to the defendant. However in this case, the affidavits did not show how and from what date the plaintiff had become entitled to charge an interest of 14% pa. This was a material omission as the defendant expressly disputed the liability to pay interest at 14% pa.
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> (2) The objective of O 83 r 3 is to enable the defendant to know at least by the date of the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the charge at the date on which the order is made'.

In *Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor* [1995] 2 MLJ 537, the court held (at p 537F–G) that:

> The failure to comply with r 3(3) and (6) in particular, the failure to state the amount of the repayments and instalments in arrear were serious omissions which warranted a dismissal of the action for the absence of such pertinent information was highly prejudicial to the defendants. Fairness requires the chargee to state and state accurately the amount of repayments made and the amount of instalments in arrears.

I find that the plaintiff has failed to file a notice that complies with the requirements of O 83 r 3, and the second objection of the defendant is sustained. Thus, I would not allow this application for an order for sale of the charged lands, and dismiss it. Costs to be taxed to the defendant unless agreed.

Application dismissed.

Reported by Joel Ng